INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] IV

II. Regulations of Interstate Commerce (*continued*)

2. *Taxes not Discriminating against Interstate Commerce* (continued)

A. Taxes on Privileges (*concluded*)

(*d*) *Recent Supreme Court Decisions on California and Massachusetts Statutes*

IN the preceding installment of this discussion it was said that the similarity between the business of the complainants in the California case of *Albert Pick & Co.* v. *Jordan*[2] "and that of the Crane Company in *Looney* v. *Crane Co.*[3] makes it certain that, on writ of error, the judgment of the California court would be reversed by the United States Supreme Court."[4] This venturesome prediction was made in ignorance of the fact that on June 4, 1917, the judgment of the California court had been affirmed by the Supreme Court.[5] Benevolent readers may find some excuse for this oversight in the circumstance that the Supreme Court wrote no opinion, and therefore its decision did not find its way into the digests.[6] More justification, however, is necessary for the error in judgment.

The opinion of the California court, by Judge Henshaw, did not

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[1] For preceding installments of this discussion see 31 HARV. L. REV. 321–72 (January, 1918), *Ibid.*, 572–618 (February, 1918) and *Ibid.*, 721–78 (March, 1918).

[2] 169 Cal. 1, 145 Pac. 506 (1915).

[3] 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917).

[4] 31 HARV. L. REV. 776.

[5] Albert Pick & Co. *v.* Jordan, 244 U. S. 647, 37 Sup. Ct. Rep. 741 (1917).

[6] Malevolent readers will be glad to know that the decision came to the writer's attention through no diligence of his own, but through the fact that it was cited in the brief for the Commonwealth in International Paper Co. *v.* Massachusetts, 38 Sup. Ct. Rep. 292 (1918), a copy of which was furnished him through the courtesy of Wm. Harold Hitchcock, Assistant Attorney General of Massachusetts, who prepared and argued the cases for the Commonwealth discussed in this article.

recite the provisions of the statutes under which the excises in issue were levied. It referred to "the annual corporation license-tax" as one "founded on the total capital stock";[7] it pointed out that the Western Union Company, if it had undertaken to do business in California, would have been compelled to pay a fee of $10,000 for filing with the Secretary of State a copy of its charter as it was required to do, in addition to an annual license tax of $250;[8] and it saw no significance in the fact that the Massachusetts tax sustained in *Baltic Mining Co.* v. *Massachusetts*[9] was by statute limited to $2,000.[10] No mention was made of any provision in the California statute prescribing a maximum which the imposition should not exceed. The opinion proceeded on a theory quite inconsistent with that announced by the Supreme Court in *Looney* v. *Crane Co.*[11]

The Supreme Court, in affirming the judgment of the California court, contented itself with filing the following memorandum opinion:

"June 4, 1917. Per Curiam: Judgment affirmed with costs, upon the authority of Kansas City, Ft. S. & M. R. Co. *v.* Botkin, 240 U. S. 227, 60 L. Ed. 617, 36 Sup. Ct. Rep. 261."[12]

The Botkin Case thus relied upon by the Supreme Court involved the Kansas statute as amended following the decision of *Western Union Telegraph Co.* v. *Kansas.*[13] The amended statute limited the annual imposition to $2,500. Moreover the complainant in the Botkin Case was a domestic corporation. The complainant in *Albert Pick & Co.* v. *Jordan*[14] was an Illinois corporation resisting a California tax. *Kansas City, M. & B. R. Co.* v. *Stiles*,[15] decided on December 4, 1916, had made it clear that a domestic corporation could be subjected to a tax which the Western Union Case had declared could not be imposed on a foreign corporation, and

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[7] Albert Pick & Co. *v.* Jordan, 169 Cal. 1, 14, 145 Pac. 506 (1915).
[8] *Ibid.*, 169 Cal. 1, 13, 145 Pac. 506 (1915).
[9] 231 U. S. 68, 34 Sup. Ct. Rep. 15 (1913).
[10] Albert Pick & Co. *v.* Jordan, 169 Cal. 1, 18, 145 Pac. 506 (1915).
[11] Note 3, *supra.*
[12] Note 5, *supra.*
[13] 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910).
[14] Notes 2 and 5, *supra.*
[15] 242 U. S. 111, 37 Sup. Ct. Rep. 56 (1916). See 31 HARV. L. REV. 599–600.

thus had made inapplicable to controversies respecting foreign corporations, precedents sustaining identical taxes on domestic corporations. Clearly then the Supreme Court was not justified in asserting that the Botkin Case [16] answered the contentions of the complainant in the Pick Case,[17] unless Pick and Company were a domestic corporation, and unless in addition the excises of which it complained were levied under statutes which set some limit to the amount which might be charged.

It is conceivable that on June 4, 1917, when the Pick Case was decided, the Supreme Court was of the opinion that foreign corporations not engaged in transportation were subject to any exactions which might be imposed on domestic corporations. But even then, if it was aware that the California exaction was measured by total capital stock with no maximum limitation, it should have rested the Pick Case on the authority of the Stiles Case [18] rather than the Botkin Case.[19] And if on June 4, 1917, the Supreme Court harbored the idea that foreign corporations not engaged in transportation might be subjected to taxes measured by total capital stock, that idea was definitely cast out on December 10, 1917, when *Looney* v. *Crane Co.*[20] was decided.

It is doubtless true, however, that the Kansas tax involved in *Kansas City, Ft. S. & M. R. Co.* v. *Botkin* [21] might be exacted from a foreign corporation. But this is because Kansas set a fixed limit to its demands, however large the capital of the corporation. In citing the Botkin Case as conclusive of the point at issue in the Pick Case, the Supreme Court must therefore have thought either that the California statutes limited the exactions which might be imposed thereunder, or else that the absence of such a limit was immaterial. The latter hypothesis seems inconsistent with *Looney* v. *Crane Co.*[22] But it may not be, as will be pointed out later.

If the Supreme Court thought that the California exaction was limited in amount, however large the capital of the corporation in question, it was in error. The Pick Case originated in a petition by the foreign corporation for a mandate against the secretary of state, directing him to accept and file certain papers without pay-

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[16] 240 U. S. 227, 36 Sup. Ct. Rep. 261 (1916).
[17] Note 5, *supra*.
[18] Note 15, *supra*.
[19] Note 16, *supra*.
[20] Note 3, *supra*.
[21] Note 16, *supra*.
[22] Note 3, *supra*.

ment of the fee exacted by subdivision 4 of section 409 of the Political Code, or of the corporation license tax of 1905. The annual license tax was limited in amount. It began at $10 for corporations with capital of $10,000 or less, and rose to $200 for corporations with capital not exceeding $5,000,000. But all corporations having a capital in excess of $5,000,000 paid only $250, however large their capital.[23] But the fees to be paid for filing with the secretary of state a copy of the corporate charter increased indefinitely, and the filing of the charter and payment of the fee were conditions prerequisite to the right to do local business within the state. Corporations with a capital between $500,000 and $1,000,000 had to pay $100. If the capital stock exceeded $1,000,000, the statute called for "$50 additional for every $500,000 or fraction thereof of capital stock over and above $1,000,000." [24] Thus corporations had to pay $100 for every $1,000,000 of capital stock. As was stated in the opinion of the California court, the Western Union Telegraph Company under this statute would have been compelled to pay $10,000 in California, as against the $20,100 which it had to pay under the Kansas statute involved in *Western Union Telegraph Co.* v. *Kansas*.[25]

Thus one of the statutes complained of by Albert Pick and Company imposed a fee graduated according to capital stock, with no maximum limit. This fee, however, under the terms of the statute had to be paid but once. On this ground the statute might be distinguished from the Texas statute in *Looney* v. *Crane Co.*[26] which called for recurrent payments each decade. But to sanction such a distinction would do violence to *Western Union Telegraph Co.* v. *Kansas*,[27] since the Kansas statute there involved called only for a single payment for filing a copy of the corporate charter. A provision in the Kansas statute to the effect that any corporation applying for a renewal of its charter should comply with the act to the same extent as provided for the chartering and organizing of new corporations, was not referred to in the opinion

[23] The statutory provision for the annual license fee is quoted in H. K. Mulford Co. *v.* Curry, 163 Cal. 276, 279–80, 125 Pac. 236 (1912).

[24] The statutory provision for the filing fee is quoted in H. K. Mulford Co. *v.* Curry, 163 Cal. 276, 279, 125 Pac. 236 (1912).

[25] Note 13, *supra*.

[26] Note 3, *supra*.

[27] Note 13, *supra*.

of the court and seems to be drawn to apply to domestic rather than to foreign corporations. It would seem therefore that the Western Union Case held squarely that a fee for filing a copy of the corporate charter could not be demanded even once, if it was measured by the total capital stock, with no maximum limit.

It is not to be lightly assumed that the Supreme Court in affirming the California judgment without opinion meant to depart from this prior ruling. No objection can be raised to the affirmance of the judgment, for the petitioner sought to compel the filing of its papers without paying either the filing fee or the annual license tax. The latter was properly demanded by the state, since its amount was limited to $250. The petitioner, therefore, was not entitled to judgment on its demurrer to the answer of the secretary of state. But the opinion of the state court had sanctioned the requirement of the unlimited filing fee as well as of the limited annual license fee. The Supreme Court, therefore, in affirming the judgment below, without rendering an opinion, has given the California court reason to believe that its opinion as well as its decision was warranted. The Supreme Court has thus left a loophole for further controversy, which might have been closed by an opinion indicating the specific grounds on which it sustained the court below.

The filing fee demanded of the petitioner was only $100, as its capital did not exceed $1,000,000. Such a fee is a moderate one to exact from a corporation of any size, particularly if it is to be demanded only once. As a specific charge it would seem not open to question. But the Supreme Court seems to have regarded a fee assessed on a vicious basis as thoroughly tainted by its associations, even though in other company or as a specific charge it would be deemed without fault. The inference, then, that the Supreme Court in sustaining the California court in the Pick Case[28] deliberately sanctioned the measure adopted by the California statute for fixing the amount of the filing fee, cannot be accepted. The only grounds on which such sanction could be legi-

[28] It is of course possible that, as the Pick Case was presented to the Supreme Court, the objection to paying the $100 filing fee was not urged. But as the record is presented by the statutes, the opinion of the California court, and the memorandum opinion of the Supreme Court, there is nothing to show that the issues presented to the Supreme Court differed from those passed upon by the state court.

timately based are inconsistent with the implications to be drawn from the combination of the Western Union Case with the case of *Locomobile Co. of America* v. *Massachusetts*.[29] The former stands for the ruling that a single charter fee is subject to the same restrictions as an annual license fee. The latter holds that a corporation may complain of the removal of the statutory maximum limit to the annual imposition, even though the presence or absence of such limit does not affect the amount demanded from it.

The Locomobile Case [30] was one of three decisions handed down by the Supreme Court on March 4, 1918. All three involved the exactions required of foreign corporations by the Commonwealth of Massachusetts. *Cheney Brothers Co.* v. *Massachusetts* [31] dealt with the Massachusetts statute of 1909 which had been applied in *Baltic Mining Co.* v. *Massachusetts*.[32] The complaining corporations were those against whom judgments were rendered by the Supreme Court of the Commonwealth in *Marconi Wireless Telegraph Co.* v. *Commonwealth*,[33] considered in the previous installment of this discussion.[34] The judgments of the court below were sustained, with the single exception of that rendered against the Cheney Brothers Company.

The issue presented to the Supreme Court was whether the several corporations were engaged in local commerce which was separate and distinct from their interstate commerce. The Cheney Brothers Company kept no stock of goods in Massachusetts. Its Boston office was headquarters for salesmen, and samples were kept there. All orders obtained by salesmen in Massachusetts were subject to approval by the home office in Connecticut, and were filled from stock kept outside of Massachusetts. Collections were made from the home office in Connecticut, and from that office were paid the salaries of the Massachusetts salesmen and the rent of the Boston office. The Supreme Court held that there was nothing done in Massachusetts "that can be regarded as a local business as distinguished from interstate commerce." [35] The

[29] 38 Sup. Ct. Rep. 298 (1918).
[30] Note 29, *supra*.
[31] 38 Sup. Ct. Rep. 298 (1918).
[32] Note 9, *supra*.
[33] 218 Mass. 558, 106 N. E. 310 (1914).
[34] 31 HARV. L. REV. 741–45 (March, 1918).
[35] 38 Sup. Ct. Rep. 295, 296 (1918).

display of samples in Boston was said to be merely a means for carrying on interstate commerce. The inference or assumption relied on by the state court, to the effect that Massachusetts salesmen took some orders from Connecticut purchasers which were filled from the Connecticut mill, was said not to give any warrant to Massachusetts to tax the corporation, on the ground that it was engaged in local as well as interstate business. "In such cases," said Mr. Justice Van Devanter, "it is doubtless true that the resulting sale is local to Connecticut, but the action of the Boston office in receiving the order and transmitting it to the home office partakes more of the nature of interstate intercourse than of business local to Massachusetts and affords no basis for an excise tax in that state." [36]

Among the corporations held subject to the excise tax was the Locomobile Company of America, a West Virginia corporation manufacturing automobiles in Connecticut, and doing in Massachusetts, in addition to interstate commerce, "an extensive local business . . . in repairing cars of its own make and use, and also in selling second-hand cars taken in partial exchange for new ones." [37] The excise in question was levied under the Act of 1909, which fixed the amount by taking one-fiftieth of one per cent of the total capital stock until the tax amounted to $2,000. A simple computation will reveal that the only corporations which could derive any benefit from this provision for a maximum are those whose capital is in excess of $10,000,000. In 1913, when the excise was levied, the Locomobile Company had a capital of $5,000,000, and the tax of $1,000 demanded from it was in no way affected as to its amount by the provision in the statute that no tax should exceed $2,000.

In 1914 Massachusttes passed the following statute:

"Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one-hundredth of one per cent of the par value of its author-

[36] 38 Sup. Ct. Rep. 295, 296 (1918).
[37] 38 Sup. Ct. Rep. 295, 297 (1918).

ized capital stock in excess of ten million dollars as stated in its annual certificate of condition." [38]

The section fifty-six referred to was the provision applied to the Locomobile Company in the Cheney Brothers Case.[39] Inasmuch as the measure adopted for assessing the excise exacted by the Act of 1914 was the amount which the capital stock exceeded $10,000,000, the Locomobile Company, though belonging to the class of corporations required by the Act of 1914 to pay the additional excise, did not come within the clutches of the measure by which the amount of the tax was determined. The Act of 1914 could not, therefore, operate in any way to the disadvantage of the Locomobile Company, unless during the preceding year its capital stock had more than doubled.

No such doubling had taken place. The authorized capital had been increased from $5,000,000 to $6,500,000, so that the excise assessed in 1915 was $300 larger than that assessed in 1913. But the Locomobile Company was still $3,500,000 away from the fangs of the Massachusetts statute of 1914. The Supreme Court of Massachusetts sustained the $1,300 tax of 1915 [40] on the au-

[38] St. 1914, c. 724, 1. The section is quoted in International Paper Co. *v.* Massachusetts, 38 Sup. Ct. Rep. 292 (1918).

[39] Note 31, *supra*. The section is quoted in International Paper Co. *v.* Massachusetts, 38 Sup. Ct. Rep. 292, 293 (1918). It reads as follows:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." Before the enactment of the Act of 1914, the Act of 1909 had been limited in respect to the corporations to which it is applicable by the decision of the Supreme Court of Massachusetts in Attorney General *ex rel.* Commissioner of Corporations *v.* Electric Storage Battery Co., 188 Mass. 239, 74 N. E. 467 (1905). The interpretation of the state court was summarized by the Supreme Court of the United States in Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 84, 34 Sup. Ct. Rep. 15 (1913), as follows:

"Construing the act in question, the supreme judicial court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business, which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce, or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. And the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce."

[40] Locomobile Company of America *v.* Commonwealth, 228 Mass. 117, 117 N. E. 5 (1917).

thority of *Baltic Mining Co.* v. *Massachusetts*.[41] Chief Justice Rugg, in the concluding sentence of the opinion, observed: "Since no part of the excise here challenged was levied under the terms of St. 1914, c. 724, that statute need not be considered." [42]

But the Supreme Court of the United States took a different view. Mr. Justice Van Devanter declared that the "tax is of a designated per centum of the entire authorized capital, and was imposed after the maximum limit named in St. 1909, c. 490, Part III, § 56, was removed by St. 1914, c. 724, § 1." [43] He held therefore that "as thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, and *Looney* v. *Crane Co.*, 245 U. S. 178." [44]

This construction of the Massachusetts excise system was possible only because the $2,000 maximum in the Act of 1909 afforded no protection to a corporation whose capital was less than $10,000,000, and because the Act of 1914 imposed an additional unlimited excess measured by capital in excess of that amount. There was no hiatus between the two taxes. The second took hold where the first let go. It was therefore good realism to insist that the second removed the maximum limit contained in the first. Massachusetts after 1914 had a taxing system which made the excises on foreign corporations increase indefinitely *pari passu* with increase of their capital stock. The practical result would have been the same had the Act of 1914 designated as the corporations subject to its demands, not those named in the Act of 1909, but only corporations having a capital in excess of $10,000,000. It would have been substantially the same had the class been designated as those corporations having a capital in excess of $10,100,000, or had the maximum in the Act of 1909 been lowered to $1,900. Either of these devices would have created a gap between the two demands of the state. But such lacunæ might well be disregarded on the principle of *de minimis non curat lex*. A steadily growing corporation would find in them too brief a respite.

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[41] Note 9, *supra*.

[42] 228 Mass. 117, 122, 117 N. E. 5 (1917).

[43] Locomobile Company of America *v.* Massachusetts, 38 Sup. Ct. Rep. 298 (1918).

[44] *Ibid.*

We must concede that it was a sensible practical judgment which characterized the Massachusetts tax as one based on total capital stock, with no maximum limitation. Yet the situation resulting from the two contemporaneous decisions of the Supreme Court, in both of which the Locomobile Company was a complainant, exhales an atmosphere of artificiality. On the very same day the court sustains one excise measured by the total capital stock of the Locomobile Company, and declares invalid another whose amount is determined by the identical measure so far as the complainant was concerned. Both excises according to the state court were levied under the same statute. True, the statutory situation had been changed in the interim by the provision in the Act of 1914 imposing an additional excise measured by the capital in excess of $10,000,000. Those who bow to the authority of arithmetic must concede that this additional excise had the effect of removing the maximum of $2,000 contained in the Act of 1909. But the result reached by the Supreme Court is that a corporation which did not benefit from the $2,000 maximum, and which could not under the facts of the case before the court be injured by its removal, nevertheless reaps from such removal the boon of immunity from previously valid demands.

This seems strange fruit to pick from the stock of realism. But on closer analysis it may appear that the fruit is from another tree. The artificiality was introduced when it was held in the Baltic Case that a tax on small corporations, measured by their total capital stock, was valid because a tax on their larger competitors or neighbors would be a specific charge of $2,000. The result of the Locomobile Case really questions the soundness of the Baltic Case. Yet the Locomobile Case cannot be said to shake the authority of the Baltic Case, since the Baltic Case was unanimously reaffirmed in the Cheney Brothers Case decided on the same day as the Locomobile Case. Quite plainly the Supreme Court has no present intention of receding from the Baltic Case.

The present state of the law can best be justified by being formulated as follows. Foreign corporations conducting within a state a local business which is distinct from their interstate business are subject to taxation for such exercise of their corporate functions. This taxation may take the form of a specific charge of a reasonable amount. $2,000 is a reasonable amount, whatever the size of the

corporation, and whatever the volume of the local business. If the state wishes to relieve corporations with small capital from the payment of the full $2,000, it may do so by giving what is in effect a sliding discount determined by the extent to which their capital stock falls short of $10,000,000, or some other properly designated sum. "If the maximum is no more than the amount which might be imposed as a flat charge on all seeking admission for domestic business, the reference to total capital stock may be regarded as an act of grace towards those who can benefit from it." [45]

It may be added that, even if the maximum were more than might be imposed as a flat charge on all, the court may properly regard this defect as cured by a provision for a discount in favor of those on whom it would be improper to impose the maximum. In such a provision it may find a sufficient reason for treating the question whether the maximum might be imposed on all as a purely hypothetical one, into which it need not enter in order to determine the dispute before it. This line of reasoning undoubtedly has curves which to some may make the line look like a circle. The premise on which the argument is built seems to be kicked out from under, after it has served its initial purpose. The difficulty can perhaps be avoided if we say that what maximum is reasonable varies with circumstances. Call this reasonable maximum, X. X may be larger where it is not the measure for taxes on small corporations than where it is. If in some cases the state provides that the tax shall be X−Y, and in others X−Z, then X may be regarded as reasonable provided it is suitable for all those cases for which it is made the sole measure. Even with this line of approach, it may well be urged that the court should consider the reasonableness of Y and Z. "Corporations with little capital might prefer a low rate applied to total capital, with no maximum, to a higher rate applied to total capital, with a maximum which would not affect the amount exacted of them." [46]

Perhaps after all the composite photograph of the decisions cannot be put in a logical frame. To many minds this would necessitate the conclusion that some of the decisions are "wrong." This easy way out of difficulties has its train of worshippers. But it would afford little solace to those corporations whose taxes were

[45] 31 HARV. L. REV. 777. [46] *Ibid.*, 612.

sanctioned by the decisions thus thrown into the discard. These entities, if they reasoned, might face with less rebellion the unescapable facts, by following the implication of Mr. Justice Holmes's statement that "we are to look for a practical rather than a logical or philosophical distinction."[47] And those whom William James was wont to call the "tough-minded" will easily follow the lure of the same bait.

From this angle, the decisions since 1910 may be looked at as modifications of the earlier doctrine that the power of the state over the local business of foreign corporations is unlimited. The earlier doctrine has not been abandoned to the extent of insisting that the exaction of the state must be nicely adjusted to the amount of local business carried on therein. Though the old arbitrary power has been throttled, the state still has some latitude in fixing the amount of its exaction. The tax falls on a proper subject, and its amount, like that of all excise taxes, may be fixed by more rough-and-ready methods than could be used in assessing *ad valorem* taxes on property. All that is required is that the methods selected shall not palpably and necessarily exact tribute from sources which lie within the protection of the commerce clause and the due-process clause. A maximum limitation on the demand is a safeguard against such covert invasion of forbidden territory by excises on large corporations. There is still the possibility that the limit set may not suffice to prevent excises on small corporations from encroaching on the area in which such small corporations are entitled to shelter. But this danger is greatly minimized if small corporations are assessed on a basis which is likely in most cases to give them the advantage of the circumstances which would make the maximum levy infringe their constitutionally protected interests.

As to the dangers which are not wholly averted, it can only be said with Mr. Justice Holmes that "constitutional law, like other mortal contrivances, must take some chances."[48] Courts cannot project the lines of constitutional limitations with the same delicate tracery with which they might draft statutes. Judges should be loath to declare invalid a fiscal system which is an exercise of constitutional power, merely because in some stray instances it may

[47] Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908). The passage is quoted more at length in 31 HARV. L. REV. 602.

[48] Blinn *v.* Nelson, 222 U. S. 1, 7, 32 Sup. Ct. Rep. 1 (1911).

operate in a manner that might be deemed unconstitutional if specifically devised for the particular case. Common law, statutes, and constitutional interpretation alike must at times, for the sake of a desirable degree of stability and generality, sacrifice the precision of adjustment that might be attained by kaleidoscopic or tessellated variations or modifications of the law to meet the peculiar demands of every conceivable situation. The Supreme Court has sacrificed generality in recognizing that a suitable maximum may remedy the vice of the measure of total capital stock. If it stops there, and declines to examine the balance sheets of every contentious taxpayer, it simply establishes a point beyond which for practical reasons it will not go. Whether or not these considerations furnish sufficient justification for the tenuousness of the logical distinction between the Baltic Case and the Cheney Brothers Case on the one hand, and the Locomobile Case on the other, they may at least explain where they do not justify.

Those who agree that the General Court of Massachusetts sought to subject foreign corporations to excises measured by their total capital stock without any qualification, and thus to accomplish what *Looney* v. *Crane Co.*[49] had forbidden, may still criticize the result of the Supreme Court's decision in the Locomobile Case.[50] It will be noted that the Supreme Court of the United States insisted that the Massachusetts statute of 1914 was a material element in the case before it, although the Massachusetts court had declared that it "need not be considered."[51] Thus the Supreme Court holds that the two statutes of Massachusetts are inseparable, although the Massachusetts court had clearly implied the contrary. The reason for the Supreme Court's attitude appears more clearly from its opinion in *International Paper Co.* v. *Massachusetts*,[52] decided on the same day as the Locomobile Case.

The International Paper Case involved an excise of $5,500 on a foreign corporation having an authorized capital of $45,000,000. Of this $5,500, $2,000 was levied under the Act of 1909, and $3,500 under the Act of 1914. It will be remembered that the Massachusetts court on September 13, 1917, had sustained the entire

[49] Note 3, *supra*.
[50] Note 43, *supra*.
[51] Note 42, *supra*.
[52] 38 Sup. Ct. Rep. 292 (1918).

exaction.[53] The Supreme Court declares the whole levy invalid. In considering the Massachusetts legislation, Mr. Justice Van Devanter says:

"While the legislation under which the tax was assessed and collected was enacted in part in 1909 and in part in 1914, its operation and validity must be determined here by considering it as a whole, for the opinion of the state court not only holds that the 'maximum limitation' put on the tax by the part first enacted 'is removed' by the other, but treats the two parts as exacting a single tax based on the par value of 'the entire authorized capital' and computed as to ten million dollars thereof at the rate of one fiftieth of one per cent and as to the excess at the rate of one one-hundredth of one per cent." [54]

And near the end of the opinion, the statement, that "since 1914 the Massachusetts law has been in its essential and practical operation like those held invalid"[55] in the Western Union Case and the Looney Case, is prefaced by the clause: "Accepting the state court's view of the change wrought by the later statute."[56] Thus the Supreme Court relies on the interpretation of the state court to reach the conclusion that the Act of 1909 is so amalgamated with the Act of 1914 that, if the latter cannot stand, the former must fall also.

No such question was passed upon by the Massachusetts court in the International Paper Case,[57] for that court held both statutes constitutional, and therefore was not called upon to inquire whether the Act of 1914 was separable from the Act of 1909. But in its opinion in the Locomobile Case,[58] it declared plainly enough that the Act of 1914 had no bearing on the validity of the Act of 1909. From this it is certain that the Massachusetts court would hold the two statutes separable whenever a decision of the controversy before it required consideration of the point. No one can doubt that the Massachusetts court, if it had thought that the Act of 1914 was inapplicable to foreign corporations engaged partly in interstate commerce, would have held that the frustrated attempt of the

[53] International Paper Co. *v.* Commonwealth, 228 Mass. 101, 117 N. E. 246 (1917). See 31 HARV. L. REV. 745–54.

[54] 38 Sup. Ct. Rep. 292, 293 (1918).

[55] 38 Sup. Ct. Rep. 292, 294 (1918).

[56] *Ibid.*

[57] Note 53, *supra.*

[58] Note 40, *supra.*

General Court of the Commonwealth did not operate to render inapplicable to such corporations the earlier Act of 1909. Yet the Supreme Court in effect assumes the contrary, by its failure to give specific consideration to the question whether the two statutes were separable. It seems to decline to go into the question on the ground that the state court had decided it against the contention of the complainants.[59]

Doubtless no one will be more surprised at this eventuation than the judges of the Massachusetts supreme court. Their disposition of the International Paper Case did not require them to consider whether one part of the tax could be held good if the other was declared invalid. And their analysis of the combined effect of the two statutes was not directed to any such issue. Moreover, in the Locomobile Case they insisted that the Act of 1909 stood entirely on its own legs. Yet the Supreme Court, without giving independent consideration to the question, relies on other statements of the Massachusetts court, wholly unrelated to the question of separability, to reach the conclusion that an unconstitutional addition to the Act of 1909 must be given the effect of invalidating the prior statute, though that is its sole effect.

Though the Supreme Court accepts the judgment of the state court on the question whether different provisions in state statutes are separable or not,[60] it forms its independent judgment when the state court has not spoken on the point.[61] The test which it applies is whether it can reasonably be believed that the legislature would

[59] This cannot be the result of mere inadvertence, for the brief for the Commonwealth in the Locomobile Case contains the heading: "The New Statute (St. 1914, c. 724) has no Bearing upon the Rights of this Petitioner." Under this heading it was argued:

"If for any reason this new statute is unconstitutional as a whole, or if, by reason of particular circumstances in individual cases, any tax imposed under it upon any corporation subject to its terms is void, the system of taxation established by section 56 remains unaffected. Therefore the additional tax imposed by this statute is plainly separable from the tax imposed under section 56, and a decision that any tax under the statute of 1914 is invalid cannot affect taxes assessed upon any corporation whose authorized capital stock does not exceed $10,000,000. This in substance is the ruling of the Supreme Judicial Court of Massachusetts in the case at bar. The ruling of that court that these two statutes are entirely separable will, of course, be followed here as purely a matter of statutory construction."

[60] Noble *v.* Mitchell, 164 U. S. 367, 17 Sup. Ct. Rep. 110 (1896).

[61] International Text Book Co. *v.* Pigg, 217 U. S. 91, 112–13, 30 Sup. Ct. Rep. 481 (1910), holding provisions inseparable; Southwestern Oil Co. *v.* Texas, 217 U. S. 114, 120–21, 30 Sup. Ct. Rep. 496 (1910), holding provisions separable.

have enacted the valid part without the part which is declared invalid.[62] In *Winona and St. Peter Land Co.* v. *Minnesota*,[63] for example, the question was whether a statute imposing back taxes on real and personal property could be enforced as to real property if it was invalid as to personal property. The Supreme Court, speaking through Mr. Justice Brewer, expressed its approval of the decision of the state court as follows:

"It seems to us, also, that the assumption that it cannot be believed that the legislature would never seek to provide for the collection of back taxes on real property without at the same time including therein a like provision for collecting back taxes on personal property, cannot be sustained."[64]

So the question which the Supreme Court should have asked and answered in the International Paper Case was whether it could reasonably be believed that the General Court would have wished to tax the complainant $2,000 if it could not tax it $2,000 plus $3,500. The question in the Locomobile Case was whether it could reasonably be believed that the General Court would have wished to continue to apply to the complainant the Act of 1909 if it could not apply to others the Act of 1914. To borrow a familiar form of statement, it can safely be said that "to ask the question is to answer it."

The result reached by the Supreme Court illustrates the hard saying that "from him that hath not shall be taken away even that which he hath."[65] As exegesis of a puzzling passage of Scripture, the decision may be welcomed. It may be a wholesome warning to the states not to encroach on forbidden ground, lest their trespasses cost them their own freeholds. But apart from its moral values, the result was a curious and unnecessary one. Before the passage of the Act of 1914, the Act of 1909 was without fault. The Act of 1914 did not purport to amend the Act of 1909. It refers to its predecessor only to spare itself from enumerating specifically the corporations to which it applies.[66] The Supreme Court holds that

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[62] Southwestern Oil Co. *v.* Texas, note 61, *supra, loc. cit.*

[63] 159 U. S. 526, 16 Sup. Ct. Rep. 83 (1895).

[64] 159 U. S. 526, 539, 16 Sup. Ct. Rep. 83, 88 (1895).

[65] Matthew 25: 29.

[66] The Act of 1914, by saying "every foreign corporation subject to the tax imposed by section fifty-six" etc., in effect adopts the interpretations of the Massachusetts

the Act of 1914 cannot be enforced against corporations engaged partly in interstate commerce. As to them it is void and of no effect. Yet it is given the important effect of vitiating the Act of 1909 in so far as it applies to corporations engaged partly in interstate commerce. The Supreme Court places the burden of this result on the shoulders of the Massachusetts court, because that court in analyzing and sanctioning the combined effect of the two statutes says rightly that the maximum limitation contained in the former is removed by the latter. But in thus characterizing the effect of the latter on the former, Chief Justice Rugg of the Massachusetts court was talking arithmetic, not law. His arithmetic was correct only if the Act of 1914 was valid and enforceable. He correctly described what Massachusetts sought to do. But it failed to accomplish its desires, because the Supreme Court forbade. The situation about which the state court was talking turns out not to exist. Yet what Chief Justice Rugg said about that situation, the Supreme Court treats him as saying about another situation which he never had in mind. By such thought transference the Massachusetts court is held responsible for the position that the Massachusetts excise system after 1914 was a unit which must stand or fall as a unit, although that court had stated specifically that in determining the constitutionality of enforcing the Act of 1909 after the enactment of the Act of 1914, the latter statute "need not be considered."[67]

Plainly enough the Supreme Court misapprehended the position of the Massachusetts court. And the state court must be held immune from most, if not all, of the responsibility for the blunder. It may perhaps be criticized for its failure to appreciate the likelihood that the Act of 1914 would come a cropper when it reached the Supreme Court. Had the Supreme Court handed down its decision in *Looney* v. *Crane Co.*[68] three months earlier, the Massachusetts court would have been clearly advised that the unlimited measure of total capital stock was an improper one to apply to foreign corporations engaged partly in interstate commerce, even

court as to what corporations *are* subject to section fifty-six. See note 39, *supra*. It was doubtless because of these interpretations of the court, that the Act of 1914 referred to the "corporations subject to the tax imposed" by the Act of 1909, and did not read, as did the Act of 1909, "every foreign corporation."

[67] Note 42, *supra*.

[68] Note 3, *supra*.

though that commerce was not some form of transportation. Yet, even as the situation stood in September, 1917, the Massachusetts court had ample warning of the strong probability that the Supreme Court would insist that a maximum limitation was a *sine qua non* in a statute using total capital stock as a basis for assessing excises on foreign corporations combining local and interstate commerce. However strong the state court's anticipations to the contrary, it would have done well to have appreciated the possibility of disillusionment, and to have guarded against the unfortunate result which ensued. This it might easily have done by devoting separate consideration to the levy on the International Paper Company under the Act of 1909 and to that under the Act of 1914, thus making it unmistakably clear to the Supreme Court that it did not think that the General Court of Massachusetts wished to exempt foreign corporations from excise taxes entirely, in case it would not be permitted to subject corporations having a capital in excess of $10,000,000 to the additional excise imposed in 1914.

The legal result of the Supreme Court's decision in the International Paper Case[69] and the Locomobile Case[70] is that all excise taxes levied by Massachusetts on foreign corporations engaged partly in interstate commerce during the years 1914, 1915, 1916, and 1917 were unconstitutional interferences with interstate commerce. For so the Supreme Court has declared. It happens that most of the foreign corporations doing business in Massachusetts during the last quadrennium have paid their excises without protest,[71] so that the results of the Supreme Court's declarations are less extensive than they might have been. Taxes which could be regarded as constitutional only "upon the theory that our dual system of government has no existence"[72] have been paid and cannot be recovered, yet the government at Washington still lives. This contradiction between the law and the facts raises nice questions as to the conceptualist attitude which partitions governmental power in the United States between two authorities, each "sovereign" in its respective sphere, each impotent in the sphere of the other, and

[69] Note 52, *supra*.

[70] Note 43, *supra*.

[71] From information derived from Wm. Harold Hitchcock, Esq., Assistant Attorney General of Massachusetts.

[72] Looney *v.* Crane Co., 245 U. S. 178, 187, 38 Sup. Ct. Rep. 85 (1917). The passage is quoted more at length in 31 HARV. L. REV. 603–04.

the sphere of each wholly distinct from that of the other. It makes a pretty mental picture, but the subject of the picture never sat for it.

Since the decision of the Supreme Court in the Locomobile Case, Massachusetts has confessed the error of its ways and has brought forth fruits meet for repentance by repealing the offending Act of 1914.[73] This will doubtless restore the Act of 1909 to favor with the Supreme Court from now on, in spite of the fact that the opinion in the Locomobile Case referred to it as "indistinguishable from those adjudged invalid"[74] in the Western Union Case and those following it, thus implying that the Act of 1909 too was "invalid." But this *usus loquendi* is probably a short-cut expression having reference only to the particular situation before the court for adjudication. So far as the decisions of the Supreme Court have yet gone, the Act of 1909 might all the time have been applied to foreign corporations whose business within the state is entirely local commerce or manufacture. And even if the Supreme Court is now of opinion that the due-process clause protects foreign corporations from excises measured by their total capital stock, whether they are engaged in interstate commerce or not, and that therefore the Act of 1909 was entirely unenforceable so long as the Act of 1914 was on the statute books, it may still recognize that the "invalidity" of the Act of 1909 was due entirely to its association with the Act of 1914, and that the dissolution of the connection between them will restore the Act of 1909 to its pristine purity. Yet after the court's decision in the Locomobile Case, the general Court of Massachusetts might have done well, *ex majore cautela*, to accompany its repeal of the Act of 1914 with an express reënactment of the Act of 1909, and thus to deprive the Supreme Court of any opportunity to declare that the Act of 1909 was so dead that it could not be raised to life by the repeal of the Act of 1914.[75]

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[73] Chapter 76, General Code, Act of 1918; in effect March 18, 1918.

[74] 38 Sup. Ct. Rep. 298 (1918).

[75] While such a procedure would have made the future secure, it might be taken as a confession which would operate to the disadvantage of the Commonwealth in the few pending cases to recover excises levied under the Act of 1909 during the period between the enactment and the repeal of the Act of 1914. Those cases are of course on all fours with the Locomobile Case. Nevertheless it is still open to the state court to declare that the Act of 1914 was always separable from the Act of 1909, and on that ground to sustain taxes levied under the Act of 1909 after 1914.

As was to be anticipated, the Supreme Court had no difficulty in reaching the conclusion that the International Paper Company was entitled to be excused from payment of the excise measured by its total capital in excess of $10,000,000. The only possible distinction which could be drawn between the question presented and that settled in the Looney Case lay in the fact that the International Paper Company was engaged in manufacturing in Massachusetts. It will be remembered that the Massachusetts court seemed to attach some weight to this, observing that "the local manufacture of paper is disconnected with the interstate business of the petitioner except as an artificial relation has been established by the petitioner,"[76] and relying on cases holding that manufacture is not commerce.[77] The Supreme Court makes no mention of this possible distinction between the power of the state over foreign corporations whose business within the state consists largely of manufacturing and that over those whose entire local business is technically commerce. Mr. Justice Van Devanter contents himself with summarizing the propositions to be deduced from the line of cases beginning with the Western Union Case and ending with the Looney Case, and then saying of the Looney Case:

"That case and those which it followed and affirmed are fully decisive of this. The statutes then and now in question differ only in immaterial details, and the circumstances of their application or attempted application are essentially the same. In principle the cases are not distinguishable."[78]

With this disposition of the cases from Massachusetts, it seems clear that the statute of Virginia applied by the Virginia court in *General Ry. Signal Co.* v. *Commonwealth*,[79] and the statute of Ten-

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The state court is not bound by the Supreme Court's erroneous interpretation of its previous utterance. The Supreme Court, on the other hand, will be bound by a definite and unescapable declaration from the state court that the offending Act of 1914 was entirely separate and distinct from the Act of 1909. Thus the state court can prevent the recurrence of the fatality which happened in the Locomobile Case, without laying itself open to the charge of attempting to give retroactive effect to the repeal of the Act of 1914.

[76] International Paper Co. *v.* Commonwealth, 228 Mass. 101, 112, 117 N. E. 246 (1917). See 31 HARV. L. REV. 749.

[77] See 31 HARV. L. REV. 746.

[78] 38 Sup. Ct. Rep. 292, 295 (1918).

[79] 118 Va. 301, 87 S. E. 598 (1916). See 31 HARV. L. REV. 756–59.

nessee applied by the Tennessee court in *Atlas Powder Co.* v. *Blue*,[80] will meet with a similar fate when they reach the Supreme Court. There is a possibility that the local business of the particular complainant in the Virginia case might be regarded by the Supreme Court as so distinct from any interstate commerce in which the corporation was engaged, that its immunity from a demand measured by its total capital stock will depend upon whether the Supreme Court will overrule *Horn Silver Mining Co.* v. *New York*,[81] and thus reach the same result under the due-process clause alone as it reaches under the due-process and commerce clauses together. Yet if manufacturing is not sufficiently distinct from interstate commerce to prevent the applicability of the commerce clause, it is hard to see how a different attitude can reasonably be taken towards construction work done in the state with materials introduced from other states.

The only important question left open by the Supreme Court decisions is whether excises on foreign corporations engaged partly in interstate commerce may be measured by the receipts from all business done within the state. On this question the due-process clause has no bearing. But the receipts from interstate commerce could not be taxed directly, and the question whether they may be made the measure of a tax on a proper subject of state authority is logically difficult to distinguish from the issues raised under the commerce clause in *Looney* v. *Crane Co.*[82] and *International Paper Co.* v. *Massachusetts*.[83] But the Supreme Court has sacrificed strict logic for other considerations in sustaining taxes in fact measured by the total capital stock of the complaining corporation, provided taxes on larger corporations would be fixed by a specific maximum provision in the statute. And it may conceivably sacrifice logic and hold that the measure of receipts from business actually done within the state has not the vice of a measure which includes the value of property without the state.

We might hope to get material for prophecy from *Crew Levick Co.* v. *Pennsylvania*,[84] decided December 10, 1917; but the opinion of

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[80] 131 Tenn. 490, 175 S. W. 547 (1915). See 31 HARV. L. REV. 754–56.

[81] 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892).

[82] Note 3, *supra*.

[83] Note 52, *supra*.

[84] 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917).

Mr. Justice Pitney carefully left the precise question open. That case held that a tax on wholesale and retail dealers of merchandise, whose amount was based on the volume of business transacted, could not be measured by any receipts from foreign commerce. The portion of the tax so measured, it was said, "necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."[85] And earlier in the opinion it was declared:

"It [the tax] operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; . . ."[86]

But the opinion also says that "the distinction between this tax" and that "sustained in *Maine* v. *Grand Trunk Ry. Co.*"[87] is "obvious;"[88] and it says further that the tax "bears no semblance of a property tax, *or a franchise tax in the proper sense.*"[89]

Thus plainly *Maine* v. *Grand Trunk Ry. Co.*[90] is left unoverruled, and the court has explicitly left itself free to decide that a "franchise tax in the proper sense" may be measured in part by receipts which may not be taxed directly. When such a case comes before the Supreme Court, it may remind us that in all the cases annulling taxes measured by total capital stock, the due-process clause as well as the commerce clause was a factor. And it may say that these so-called franchise taxes measured by receipts from business done within the state are in substance taxes on intangible property and therefore sustainable as such, provided this same intangible property has not already been included in the assessment of other taxes.[91]

We shall know later.

(*To be continued.*)

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[85] 245 U. S. 292, 297–98, 38 Sup. Ct. Rep. 126 (1917).
[86] 245 U. S. 292, 297, 38 Sup. Ct. Rep. 126 (1917).
[87] 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891).
[88] 245 U. S. 292, 298, 38 Sup. Ct. Rep. 126 (1917).
[89] 245 U. S. 292, 297, 38 Sup. Ct. Rep. 126 (1917). Italics are the writer's.
[90] Note 87, *supra*.
[91] See 31 HARV. L. REV. 768, note 166.